

1 **FEDERAL ELECTION COMMISSION**

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3 **FIRST GENERAL COUNSEL'S REPORT**

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5 **MUR: 7166**

6 DATE COMPLAINT FILED: October 28, 2016

7 DATE OF NOTIFICATIONS: November 2, 2016

8 DATE RESPONSES RECEIVED: December 22, 2016

9 DATE ACTIVATED: February 27, 2017

10  
11 EARLIEST SOL: October 21, 2021

12 LATEST SOL: December 8, 2021

13 ELECTION CYCLE: 2016

14  
15 **COMPLAINANT:**

Republican Party of Brown County

16  
17 **RESPONDENTS:**

Tom Nelson

18 Nelson for Wisconsin and Dr. Beth Gillis in her  
19 official capacity as treasurer

20 Hillary for America and Jose H. Villarreal in his  
21 official capacity as treasurer

22  
23 **RELEVANT STATUTES  
24 AND REGULATIONS:**

52 U.S.C. § 30101(17)

52 U.S.C. § 30102(e)

52 U.S.C. § 30104(b), (g)

52 U.S.C. § 30116(a), (f)

52 U.S.C. § 30120

11 C.F.R. § 100.16

11 C.F.R. § 100.22

11 C.F.R. § 102.12

11 C.F.R. § 104.3(b)

11 C.F.R. § 104.4(b)-(c)

11 C.F.R. § 106.1(a)

11 C.F.R. § 109.20

11 C.F.R. § 109.21

11 C.F.R. § 110.11(a)-(c)

11 C.F.R. § 111.44

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39 **INTERNAL REPORTS CHECKED:**

Disclosure Reports

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41 **AGENCIES CHECKED:**

None

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43 **I. INTRODUCTION**

44 The Complaint alleges that congressional candidate Tom Nelson and his principal  
45 campaign committee, Nelson for Wisconsin and Dr. Beth Gillis in her official capacity as

1 treasurer (the "Nelson Committee"), violated the Federal Election Campaign Act of 1971, as  
2 amended (the "Act"), by failing to report independent expenditures for a 31-second television  
3 advertisement that expressly advocated then-presidential candidate Donald Trump's defeat, and  
4 by failing to include a proper disclaimer on the advertisement. The Complaint also alleges that  
5 Nelson and the Nelson Committee coordinated the advertisement with the authorized committee  
6 of Trump's opponent Hillary Clinton, Hillary for America and Jose H. Villarreal in his official  
7 capacity as treasurer (the "Clinton Committee"), resulting in Nelson and the Nelson Committee  
8 making, and the Clinton Committee accepting, excessive and unreported in-kind contributions.

9 We recommend that the Commission dismiss the allegations that Nelson and the Nelson  
10 Committee violated 52 U.S.C. § 30104(b) and (g) by failing to properly report independent  
11 expenditures for the advertisement, and 52 U.S.C. § 30120 by failing to include a proper  
12 disclaimer on the advertisement. We also recommend that the Commission find no reason to  
13 believe that Nelson and the Nelson Committee violated 52 U.S.C. §§ 30104(b) and 30116(f) by  
14 making and failing to report excessive in-kind contributions through the advertisement, and no  
15 reason to believe that the Clinton Committee violated 52 U.S.C. §§ 30104(b) and 30116(f) by  
16 accepting and failing to report excessive in-kind contributions through the advertisement.

## 17 II. FACTUAL BACKGROUND

18 Tom Nelson was a federal candidate in Wisconsin's 8th Congressional District during the  
19 2016 election cycle.<sup>1</sup> On October 21, 2016 — within 20 days of the November 8, 2016, general  
20 election — the Nelson Committee produced and began airing in the Green Bay market a

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<sup>1</sup> Nelson lost the 2016 general election.

- 1 31-second television advertisement entitled “Real.”<sup>2</sup> The advertisement features footage of  
2 Nelson speaking directly to the viewer as follows:

Audio	Seconds
I’m Tom Nelson, and there are some real differences between Mike Gallagher and me.	0-5
I believe big corporations and the wealthy should pay their fair share. Mike wants to give them more tax breaks.	6-11
I want to raise the minimum wage. Mike’s against that.	12-15
I want to strengthen Social Security. Mike Gallagher wants to reduce benefits to the poverty line.	16-21
And one more thing. Mike Gallagher supports Donald Trump.	22-25
I approve this message because Donald Trump is dangerous and we can’t let him become president.	26-31 <sup>3</sup>

- 3 In the final seconds of the advertisement, a “Nelson U.S. Congress” logo appears on the screen  
4 with a disclaimer that states, “Paid for by Nelson for Wisconsin. Approved by Tom Nelson.”<sup>4</sup>

- 5 The costs of the advertisement are unclear from the available information. The Nelson  
6 Committee disclosed in its 2016 Post-General Report two disbursements totaling \$144,124 on  
7 October 21, 2016, for “media.”<sup>5</sup> It is unclear whether these disbursements include any or all of  
8 the costs of the “Real” advertisement, but the payments were reported as being made on the same  
9 date that the Committee produced the advertisement and began airing it.

- 10 The Complaint alleges that the advertisement was an independent expenditure because it  
11 expressly advocated Trump’s defeat, and Trump was running for president, not opposing Nelson  
12 in the congressional race.<sup>6</sup> The Complaint argues that Nelson and the Nelson Committee

<sup>2</sup> Compl. at 2-3 (Oct. 28, 2016); Nelson & Nelson Comm. Resp. at 1 (Dec. 22, 2016).

<sup>3</sup> Nelson for Wisconsin, “Real,” YOUTUBE, <https://www.youtube.com/watch?v=kUy8WresrPw> (posted Oct. 21, 2016) (“Real”).

<sup>4</sup> *Id.*

<sup>5</sup> Nelson for Wisconsin, 2016 Post-General Report at 565, 567 (Dec. 8, 2016).

<sup>6</sup> Compl. at 1-3.

1 therefore violated 52 U.S.C. §§ 30104(b) and (g), and 30120, by failing to comply with the  
2 disclaimer and reporting requirements for independent expenditures.<sup>7</sup> The Complaint also  
3 alleges that Nelson and his Committee coordinated the communication with the Clinton  
4 Committee.<sup>8</sup> The Complaint bases this allegation on the “content and timing of the  
5 advertisement,” arguing that the advertisement benefitted Clinton because it appeared close to  
6 the date of the election and attacked her opponent.<sup>9</sup> If the communication was coordinated, the  
7 Complaint argues, Nelson and the Nelson Committee made, and the Clinton Committee  
8 accepted, unreported and excessive in-kind contributions, in violation of 52 U.S.C. §§ 30104(b)  
9 and 30116(f).<sup>10</sup>

10 Nelson and his Committee jointly respond that the advertisement did not constitute an  
11 independent expenditure because it did not expressly advocate the defeat of Trump.<sup>11</sup> They  
12 argue that the advertisement discussed Trump only to contrast Nelson’s positions to those of  
13 Trump, thereby encouraging people to vote for Nelson.<sup>12</sup> They state that the advertisement  
14 supported “the election of *Nelson*, using Mike Gallagher’s support of Trump as a reason to vote  
15 against *Gallagher*.”<sup>13</sup> Nelson and his Committee also assert that the Commission has found in  
16 the past that a similar advertisement did not constitute an independent expenditure.<sup>14</sup> As to the

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7 *Id.* at 1, 3.

8 *Id.* at 1, 3-4.

9 *Id.* at 1.

10 *Id.* at 3.

11 Nelson & Nelson Comm. Resp. at 2-3.

12 *Id.* at 3.

13 *Id.* (emphasis in original).

14 *Id.* (citing MUR 6113 (Hollingsworth)).

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1 disclaimer violation, they argue that the advertisement included the appropriate disclaimer  
2 because it had a written statement identifying who paid for the message.<sup>15</sup>

3 Further, Nelson, the Nelson Committee, and the Clinton Committee each argue that the  
4 Complaint's coordination allegations are insufficient as a matter of law.<sup>16</sup> They note that the  
5 proximity of the advertisement to the election and the fact that the advertisement mentioned  
6 Trump do nothing to establish the "conduct" prong of the Commission's three-part test for  
7 coordinated communications.<sup>17</sup>

### 8 III. LEGAL ANALYSIS

9 The Act defines "independent expenditure" as an expenditure "expressly advocating the  
10 election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation  
11 with or at the request or suggestion of" a candidate, candidate's authorized committee, or either  
12 of their agents.<sup>18</sup> A coordinated expenditure, on the other hand, is an expenditure "made by any  
13 person in cooperation, consultation, or concert, with, or at the request or suggestion of, a  
14 candidate, his authorized political committees, or their agents."<sup>19</sup> Therefore, the Complaint's  
15 allegations that the "Real" advertisement was an independent expenditure *and* that it was likely  
16 coordinated with the Clinton campaign are alternative theories, which are each addressed below.

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<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 3-4; Clinton Comm. Resp. at 1-2 (Dec. 22, 2016).

<sup>17</sup> Nelson & Nelson Comm. Resp. at 3; Clinton Comm. Resp. at 2.

<sup>18</sup> 52 U.S.C. § 30101(17); *see* 11 C.F.R. § 100.16; *see also id.* § 100.22 (defining "expressly advocating").

<sup>19</sup> 52 U.S.C. § 30116(a)(7)(B)(i); *see* 11 C.F.R. § 109.20. A coordinated communication is treated as an in-kind contribution for purposes of the Act's contribution limits and reporting requirements. *See* 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.21(b).

1           **A.     Coordination**

2           The available information does not provide a sufficient basis to find reason to believe that  
3           the Nelson and Clinton campaigns coordinated the advertisement. A communication is  
4           coordinated with a candidate, her authorized committee, or an agent of either, if it meets a three-  
5           part test set forth in the Commission's regulations: (1) the communication is paid for, in whole or  
6           in part, by a person other than the candidate or authorized committee; (2) the communication  
7           satisfies one of the content standards at 11 C.F.R. § 109.21(c);<sup>20</sup> and (3) the communication  
8           satisfies one of the conduct standards at 11 C.F.R. § 109.21(d).<sup>21</sup> All three prongs must be  
9           satisfied for a communication to be considered coordinated under these regulations.<sup>22</sup>

10           Here, the payment prong is satisfied because the Nelson Committee paid for the  
11           advertisement, rather than the Clinton Committee,<sup>23</sup> and the content prong is satisfied because  
12           the advertisement was a public communication that both referenced a clearly identified  
13           presidential candidate within the relevant timeframe<sup>24</sup> and expressly advocated the defeat of a

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<sup>20</sup>       The content prong is satisfied if the communication is: (1) an electioneering communication under 11 C.F.R. § 100.29; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office; (4) a public communication that, in relevant part, refers to a clearly identified presidential candidate, and is publicly distributed or disseminated in a jurisdiction 120 days or fewer before the candidate's primary election, up to and including the day of the general election; or (5) a public communication that is the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c)(1)-(5).

<sup>21</sup>       The types of conduct that satisfy the conduct prong include: (1) a request or suggestion; (2) material involvement; (3) a substantial discussion; (4) use of a common vendor; and (5) use of a former employee or independent contractor. *Id.* § 109.21(d)(1)-(5).

<sup>22</sup>       *Id.* § 109.21(a); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003).

<sup>23</sup>       *See* 11 C.F.R. § 109.21(a)(1).

<sup>24</sup>       *See id.* § 109.21(c)(4)(ii).

1 clearly identified federal candidate (Trump).<sup>25</sup> The Complaint, however, fails to allege specific  
2 facts related to any of the conduct standards, and we do not have any information to support a  
3 conclusion that one may have been met. The timing of the advertisement and the fact that it  
4 advocates against Clinton's opponent are too speculative standing alone to establish conduct.<sup>26</sup>  
5 Accordingly, we recommend that the Commission find no reason to believe that Nelson and the  
6 Nelson Committee made, and the Clinton Committee accepted, excessive and unreported in-kind  
7 contributions, in violation of 52 U.S.C. §§ 30104(b) and 30116(f) in connection with the  
8 advertisement.

9 **B. Independent Expenditures**

10 The Act requires committees to disclose disbursements for, and include disclaimers on,  
11 their communications. While the Act includes specific reporting and disclaimer requirements for  
12 independent expenditures,<sup>27</sup> it does not address independent expenditures by authorized  
13 committees. When the Act discusses how committees are to disclose independent expenditures

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<sup>25</sup> See *id.* § 109.21(c)(3). The television advertisement, which clearly identifies Trump as a presidential candidate and states, "Donald Trump is dangerous and we can't let him become president," is express advocacy under 11 C.F.R. § 100.22. See Real, *supra* note 3; Factual & Legal Analysis ("F&LA") at 13-15, MUR 5024R (Council for Responsible Government, Inc.) (applying the regulatory definition of express advocacy); Conciliation Agreement ¶¶ IV.24-.28, MURs 5511/5525 (Swift Boat Veterans and POWs for Truth) (same); F&LA at 6-8, MUR 5831 (Softer Voices) (same); see also Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) ("Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.").

<sup>26</sup> See 11 C.F.R. § 109.21(d); F&LA at 10, MUR 7124 (Katie McGinty for Senate) (concluding that the timing of certain commercials paid for by third parties was not sufficient to support an inference that the third parties had any private communications with the candidate they supported); F&LA at 8, MUR 6821 (Shaheen for Senate) (stating that the "rough temporal proximity" of the two communications at issue did not "give rise to a reasonable inference that any of the conduct standards were satisfied").

<sup>27</sup> 52 U.S.C. §§ 30104(b)(4)(H)(iii), (g)(1)-(2), 30120(a); see 11 C.F.R. §§ 104.3(b)(1)(vii), 104.4(b)-(c), 110.11(a)-(c).

1 on their periodic reports, it specifies that the instructions apply only to “political committee[s]  
2 other than an authorized committee.”<sup>28</sup>

3 Since the *Citizens United* decision,<sup>29</sup> the issue of whether authorized committees may  
4 make independent expenditures for other candidates has arisen in at least one enforcement  
5 matter,<sup>30</sup> However, the

6 Commission did not affirmatively conclude in the enforcement matter whether authorized  
7 committees may make independent expenditures under the Act and Commission regulations,

8 .<sup>32</sup> Rather, the Commission has approved a notice of  
9 proposed rulemaking to address the question of authorized committees' independent spending  
10 through the rulemaking process.<sup>33</sup> Accordingly, at this time, there is no specific Commission  
11 guidance on how an independent expenditure made by a candidate to support another candidate

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<sup>28</sup> 52 U.S.C. § 30104(b)(4)(H); *see* 11 C.F.R. § 104.3(b)(1)(vii).

<sup>29</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>30</sup> The Act provides that “[n]o political committee which supports or has supported more than one candidate may be designated as an authorized committee,” but specifies that “the term ‘support’ does not include a contribution by any authorized committee in amounts of \$2,000 or less to an authorized committee of any other candidate.” 52 U.S.C. § 30102(e)(3); *see* 11 C.F.R. § 102.12. In MUR 6405 (Friends of John McCain, Inc.), the Commission was faced with the question of whether 52 U.S.C. § 30102(e)(3) “prohibits an authorized committee of a federal candidate . . . from ‘supporting’ another federal candidate by paying for independent communications” that contain express advocacy. F&LA at 8-9, MUR 6405. The Commission, however, dismissed the section 30102(e)(3) allegation without reaching that question. *See id.* at 9-10. Instead, the Commission exercised its prosecutorial discretion, finding that it was “unlikely that independent spending by authorized committees would be deemed more potentially corrupting than independent expenditures by individuals, political parties, or corporations, each of which has been found [by the Supreme Court] to have a constitutional right to make unlimited independent expenditures.” *Id.* at 10.

<sup>32</sup> *See* F&LA, MUR 6405 at 9-10.

<sup>33</sup> *See* Draft Notice of Proposed Rulemaking for REG 2014-02 (Independent Expenditures by Authorized Committees; Reporting Multistate Independent Expenditures and Electioneering Communications) (Jan. 4, 2018), available at [https://www.fec.gov/resources/cms-content/documents/mtgdoc\\_18-01-a.pdf](https://www.fec.gov/resources/cms-content/documents/mtgdoc_18-01-a.pdf).

1 — assuming such expenditure would be permissible — should be reported,<sup>34</sup> and consequently,  
2 the Commission's Reports Analysis Division does not review how candidate committees are  
3 reporting independent expenditures.<sup>35</sup>

4 Given these specific circumstances, we recommend that the Commission dismiss as a  
5 matter of prosecutorial discretion the 52 U.S.C. § 30104(b) and (g) reporting violations alleged  
6 against Nelson and the Nelson Committee.<sup>36</sup> With the proposed rulemaking pending before the  
7 Commission, and no clear guidance available at this time, the Nelson Committee and other  
8 authorized committees — again assuming they can make independent expenditures — lack  
9 instruction on how to report their independent spending. Furthermore, there is no information in  
10 the record to suggest that the Nelson Committee did not report the costs of the advertisement in  
11 its regular disclosure reports. And though there is insufficient information to conclusively track  
12 the costs of the advertisement to specific reported disbursements, the 2016 Post-General Report  
13 does show disbursements for “media” on the same date that the advertisement began airing.<sup>37</sup> In  
14 light of this combination of facts, dismissal of the reporting claims is appropriate.

15 For similar reasons, we also recommend dismissing the disclaimer allegation. The Act  
16 requires any broadcast communication expressly advocating the election or defeat of a clearly

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<sup>34</sup> See *id.*; see also *supra* note 30.

<sup>35</sup> See 2015-2016 RAD Review & Referral Procedures at 118 (stating for Standard 14 that the Reports Analysis Division's review of “independent expenditure reporting problems,” including 24-Hour and 48-Hour Reports, does not apply to authorized committees).

<sup>36</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>37</sup> Nelson for Wisconsin, 2016 Post-General Report at 565, 567.

1 identified candidate to include a disclaimer, but the disclaimer requirements differ for  
2 communications authorized by a candidate and those not authorized by "any candidate."<sup>39</sup> The  
3 "Real" advertisement here included a proper authorized disclaimer unambiguously stating that  
4 Nelson paid for and approved the communication, and there was no suggestion in the  
5 advertisement that any other candidate authorized the communication. The disclaimer, therefore,  
6 while not technically compliant with the disclaimer requirements for an independent expenditure,  
7 did not mislead viewers about who paid for and approved the advertisement. Accordingly, we  
8 recommend that the Commission dismiss as a matter of prosecutorial discretion the allegation  
9 that Nelson and the Nelson Committee violated 52 U.S.C. § 30120.<sup>40</sup>

#### 10 IV. RECOMMENDATIONS

- 11 1. Dismiss the allegations that Tom Nelson and Nelson for Wisconsin and Dr. Beth  
12 Gillis in her official capacity as treasurer violated 52 U.S.C. §§ 30104(b) and (g),  
13 and 30120 by failing to correctly report and disclaim independent expenditures;  
14
- 15 2. Find no reason to believe that Tom Nelson and Nelson for Wisconsin and  
16 Dr. Beth Gillis in her official capacity as treasurer violated 52 U.S.C. §§ 30104(b)  
17 and 30116(f) by making and failing to report excessive in-kind contributions;  
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- 19 3. Find no reason to believe that Hillary for America and Jose H. Villarreal in his  
20 official capacity as treasurer violated 52 U.S.C. §§ 30104(b) and 30116(f) by  
21 accepting and failing to report excessive in-kind contributions;  
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- 23 4. Approve the attached Factual and Legal Analysis;  
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- 25 5. Approve the appropriate letters; and  
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- 27 6. Close the file.

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<sup>39</sup> Compare 52 U.S.C. § 30120(a)(1) (setting out the disclaimer requirements for a communication authorized and paid for by a candidate), *with id.* § 30120(a)(3) (setting out the disclaimer requirements for a communication not authorized by "any candidate").

<sup>40</sup> See *Heckler*, 470 U.S. 821; see also F&LA at 5-6, MUR 7039 (Bernie 2016) (dismissing a disclaimer violation when the communication included information sufficient to convey to the public who paid for and authorized the communication); F&LA at 7, MUR 7004 (The 2016 Committee) (same); F&LA at 4-5, MUR 6840 (All Citizens for Mississippi) (same); F&LA at 21-23, MUR 6438 (Art Robinson for Congress) (same).

